ILE COPY

Office-Supreme Court, U.S.
FILED
MAR 4 1960
JAMES R. BROWNING, Clerk

No. 675

In the Supreme Court of the United States

OCTOBER TERM, 1959

SOLLY K. FRANKENSTEIN AND JULIA E. FRANKENSTEIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

ROBERT N. ANDERSON,
CARTER BURDEN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:

Bistline v. *United States*, 260 F. 2d 80	6
Di Lisio v. *Vidal*, 233 F. 2d 909	6
Gamble v. *Commissioner*, 242 F. 2d 586	6
Gruver v. *Commissioner*, 142 F. 2d 363	6
Kaltreider v. *Commissioner*, 255 F. 2d 833	6
Lobello v. *Dunlap*, 210 F. 2d 465	6
Marsch v. *Commissioner*, 110 F. 2d 423	6
Pool v. *Commissioner*, 251 F. 2d 233, certiorari denied, 356 U.S. 938	5, 6
Saltzman v. *Commissioner*, decided January 27, 1955 (T.C.), affirmed, *per curiam*, 227 F. 2d 49	6

Statutes:

Internal Revenue Code of 1939: Sec. 117 (26 U.S.C., 1952 ed., 117)	2, 5
Internal Revenue Code of 1954: Sec. 1221 (26 U.S.C. 1221)	3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 675

SOLLY K. FRANKENSTEIN AND JULIA E. FRANKENSTEIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Tax Court (Pet. 24-33) is reported at 31 T.C. 431. The opinion of the Court of Appeals (Pet. 19-23) is reported at 272 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1959 (Pet. 19). A petition for rehearing was denied on December 22, 1959. The petition for writ of certiorari was filed on February 4,

1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record warrants the conclusion reached by both courts below that certain parcels of real estate sold by the taxpayer [1] during the years 1950 through 1954 were held by him primarily for sale to customers in the ordinary course of his business, and that consequently the profits derived therefrom were taxable as ordinary income rather than as capital gain.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [as amended by Section 210(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business) but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to

[1] The taxpayer's wife, Julia E. Frankenstein, is a party only by virtue of having filed a joint return with the taxpayer.

customers in the ordinary course of his trade or business;

* * * *

(26 U.S.C., 1952 ed., 117.)

Section 1221(1) of the Internal Revenue Code of 1954 (26 U.S.C. 1221), applicable to the year 1954, is substantially identical to the exclusion clause in Section 117(a)(1) of the 1939 Code.

STATEMENT

The taxpayer has been a practicing lawyer in Fort Wayne, Indiana, for many years. He inherited some lots and purchased a considerable number of others, mostly in the city of Fort Wayne. The following schedule shows the real estate acquired by him during the years 1941 through 1955, exclusive of rental properties (Pet. 26):

Year	Number of Parcels of Real Estate Purchased
1941	2
1942	37
1943	3
1944	---
1945	4
1946	356
1947	38
1948	347
1949	104
1950	12
1951	58
1952	6
1953	9
1954	5
1955	3

The lots purchased during the years 1946 through 1949 were acquired at various tax auctions. Others were purchased at regular tax sales. The taxpayer never platted or improved his lots, but did pay the cost of installing improvements required to be made by the city of Fort Wayne. The taxpayer placed homemade "For Sale" signs on some of his lots, and advertised the lots from 1948 until March 1950 in a Fort Wayne paper. (Pet. 27.) The value of the lots increased by reason of conditions in the community. (Pet. 27, 34.)

In the years indicated the taxpayer sold the following number of lots (Pet. 27, 34):

Year	Number of Lots Sold Outright	Number of Lots Sold Contract
1942	6	3
1943	1	---
1944	2	---
1945	---	1
1946	7	1
1947	4	2
1948	14	9
1949	11	7
1950	36	5
1951	27	26
1952	28	15
1953	33	29
1954	20	28

During the years here involved the sales were reported on the taxpayer's income tax returns as separate sales of individual lots. (Pet. 27.)

The taxpayer never held a real estate license and never engaged in the real estate business other than the sale of his personal holdings. As reported on his

income tax returns, the taxpayer's gains from the sale of real estate greatly exceeded his income from the practice of law for each of the years here at issue. (Pet. 28.)

The taxpayer reported the gains on the sale of the lots as resulting from the sale of capital assets. The Tax Court determined that the lots were held by the taxpayer primarily for sale to customers in the ordinary course of business, within the meaning of the exclusionary provision of Section 117(a)(1)(A) of the Internal Revenue Code of 1939 and Section 1221(1) of the Internal Revenue Code of 1954, and that the profits realized from their disposition were therefore taxable as ordinary income. (Pet. 28-31.) The Court of Appeals affirmed. (Pet. 19-23.)

ARGUMENT

The decisions of the courts below that the lots in question were held by the taxpayer primarily for sale to customers in the ordinary course of business, within the meaning of the exclusionary provisions of Section 117(a)(1)(A) of the Internal Revenue Code of 1939 and Section 1221(1) of the Internal Revenue Code of 1954, *supra*, pp. 2-3, and that the profits realized from their disposition were therefore taxable as ordinary income, are in accord with the facts of record and settled legal principles. Absent any showing that improper legal criteria have been applied, the question whether property is held primarily for sale to customers in the ordinary course of business must be resolved in the light of the particular facts. *Pool* v. *Commissioner*, 251 F. 2d 233

(C.A. 9), certiorari denied, 356 U.S. 938, rehearing denied, 356 U.S. 978; *Bistline* v. *United States*, 260 F. 2d 80 (C.A. 9); *Di Lisio* v. *Vidal*, 233 F. 2d 909 (C.A. 10); *Lobello* v. *Dunlap*, 210 F. 2d 465, 468, fn. 3 (C.A. 5); *Kaltreider* v. *Commissioner*, 255 F. 2d 833 (C.A. 3). Among the relevant factors to be considered are the frequency and continuity of the real estate transactions (*Marsch* v. *Commissioner*, 110 F. 2d 423 (C.A. 7)), whether the gains from real estate activity exceeded the taxpayer's income from other businesses (*Gamble* v. *Commissioner*, 242 F. 2d 586 (C.A. 5)), personal effort and activity in connection with the real estate transactions (*Gamble* v. *Commissioner*, *supra*), and the intention of the taxpayer in acquiring the property (*Marsch* v. *Commissioner*, *supra*; *Saltzman* v. *Commissioner*, decided January 27, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,018), affirmed *per curiam*, 227 F. 2d 49 (C.A. 3); *Gruver* v. *Commissioner*, 142 F. 2d 363 (C.A. 4)).

Applying these principles here, it is clear, as the Tax Court (Pet. 29) and the Court of Appeals (Pet. 22) held, that the frequent and regular purchase and sale of individual lots in scattered areas of Fort Wayne—involving a continuity extending over a number of years, as distinguished from isolated or casual sales—in conjunction with the fact that the taxpayer's income from real estate transactions greatly exceeded his income from the practice of law support the finding that the lots were held by the taxpayer primarily for sale to customers in the ordi-

nary course of his trade or business. There is no conflict of decisions and manifestly no question is presented which warrants review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROBERT N. ANDERSON,
CARTER BLEDSOE,
Attorneys.

MARCH 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 841021 1134